86-221

Supreme Court, U.S.
FILED
AUG 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1986

TOWNSHIP OF CLAY,
a Michigan Township,

Petitioner,

vs.

SEAWAY DRIVE-IN, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER IN DECIDING A MOTION FOR ATTORNEY FEES BROUGHT UNDER 42 U.S.C. SEC. 1988 BY A PLAINTIFF WHO PREVAILED ON A PENDENT STATE ZONING LAW QUESTION BUT LOST ON THE ADDRESSED CONSTITUTIONAL LAW QUESTIONS, A DISTRICT COURT MAY REVIEW THE RECORD AS IT EXISTED AT THE TIME A "CONSENT JUDGMENT" WAS ENTERED TO DETERMINE WHETHER A REMAINING, UNADDRESSED CONSTITUTIONAL QUESTION IS "SUBSTANTIAL"?

II.

WHETHER IN DECIDING A MOTION FOR ATTORNEY FEES BROUGHT UNDER 42 U.S.C. SEC. 1988 BY A PLAINTIFF WHO PREVAILED ON A PENDENT STATE ZONING LAW QUESTION BUT LOST ON THE ADDRESSED CONSTITUTIONAL LAW QUESTIONS, A DISTRICT COURT MAY REVIEW THE RECORD AS IT EXISTED AT THE TIME A "CONSENT JUDGMENT" WAS ENTERED TO DETERMINE WHETHER PLAINTIFF'S SUCCESS WAS REASONABLY RELATED TO THE UNADDRESSED CONSTITUTIONAL CLAIM?

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SEAWAY DRIVE-IN, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner TOWNSHIP OF CLAY, by its attorney, ROY W. ROGENSUES, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered May 19, 1986, reversing the decision of the United States District Court for the Eastern District of Michigan, Southern Division, and remanding the case for a determination of the appropriate amount of attorney fees to be awarded.

REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals is not yet published. The Opinion of the District Court concluding that Seaway was not entitled to attorney fees under 42 U.S.C. Sec. 1988 is not published. Copies of both opinions are included in the Appendix hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

(i) The date of the Judgment sought to be reviewed is May 19, 1986.

(ii) No Petition for rehearing was filed, and no Order has been entered granting an extension of time within which to petition for certiorari.

(iii) The statutory provision believed to confer upon this Court jurisdiction to review the Judgment in question by Writ of Certiorari is *28 U.S.C. Sec. 1254(1).*

STATUTE INVOLVED

The Statute involved in this case is 42 U.S.C. Sec. 1988, which provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CONCISE STATEMENT OF THE CASE

Respondent is a drive-in movie theater located in Clay Township, Michigan.

In November, 1982, the Township enacted Ordinance 77, a comprehensive ordinance regulating drive-in theatres. On March 3, 1983, Respondent filed suit. The Complaint alleged that the Ordinance violated the First, Fifth and Fourteenth Amendments to the United States Constitution, and that its application to Respondent

violated Michigan's Township Zoning Enabling Act, being MCLA 125.271 *et seq*. The District Court preliminarily enjoined enforcement of eight (8) provisions of the Ordinance on the basis that they violated State law when applied to Respondent. While the Court did not directly address the constitutionality of those eight (8) provisions, it did state that those sections appeared to be valid regulatory provisions which could not be applied to Respondent because of its "nonconforming use" status. The Court declined to enjoin enforcement of the other provisions because they were constitutionally sound.

By consent of the parties and Order of the Court dated August 31, 1984, the District Court's Opinion and Order were made a final Judgment and permanent Injunction. On March 25, 1985, the District Court denied Respondent's request for attorney fees because the Court concluded that based upon the record as it existed at the time the consent Decree was entered, no substantial constitutional questions remained regarding the validity of Ordinance 77, and the relief achieved by Respondent was unrelated to the constitutional challenge. The District Court determined the "substantiality" and "relationship" of Respondent's constitutional claims as of the date of the consent Order, taking into account the Court's previous rulings, the evidence presented to the Magistrate, and the Petitioner's Answers to Interrogatories.

On April 24, 1985, Respondent filed an appeal with the Sixth Circuit Court of Appeals. On May 19, 1986, the Circuit Court reversed the decision of the District Court, holding that the District Court erred when it looked at the record at the time of the consent Decree to determine the "substantiality" of Respondent's claim, and

also, when it concluded that Respondent's success was not "related" to its constitutional claims.

The Court stated that no inquiry should be made into the proofs behind the pleadings when the "fee" and "nonfee" claims have a common factual core, and remanded the case for determination of the appropriate amount of attorney fees to be awarded.

REASONS FOR GRANTING THE WRIT

IN DECIDING A MOTION FOR ATTORNEY FEES BROUGHT UNDER 42 U.S.C. SEC. 1988 BY A PLAINTIFF WHO PREVAILED ON A PENDENT STATE ZONING LAW QUESTION BUT LOST ON THE ADDRESSED CONSTITUTIONAL LAW QUESTIONS, A DISTRICT COURT MAY REVIEW THE RECORD AS IT EXISTED AT THE TIME A "CONSENT JUDGMENT" WAS ENTERED TO DETERMINE 1) WHETHER A REMAINING, UNADDRESSED CONSTITUTIONAL QUESTION IS "SUBSTANTIAL"; AND 2) WHETHER PLAINTIFF'S SUCCESS WAS REASONABLY RELATED TO THE UNADDRESSED CONSTITUTIONAL CLAIM.

In this case, the Respondent attacked the constitutionality and statutory validity of an Ordinance adopted by Petitioner. The Respondent, who prevailed on the State Zoning land questions but *lost* on the constitutional claims, requested an award of attorney fees based on the assertion that there was a remaining, unaddressed, *substantial* constitutional law question. The District Court properly refused to grant fees because as the Court found, following entry of the "Consent Judgment," there were no remaining substantial constitutional questions, and the success enjoyed by the Respondent was exclusively related to the State Zoning law issue.

The Circuit Court determined that the District Court erred when it looked at the proofs behind the pleadings

in deciding whether any substantial constitutional claims remained. The Circuit Court concluded that the District Court *must* have previously found that the constitutional claims were "substantial" because it had assumed pendent jurisdiction.

As noted by the District Court, it does not, *ipso facto* follow that a substantial question remains when the Court has directly denied most of the constitutional challenges made by a Plaintiff. Certainly, if the Court does not address any of the constitutional claims in a joint "fee" and "nonfee" case and decides the case strictly on the basis of a pendent State law question, then the Circuit Court's analysis is sound. Where, however, most of the constitutional law issues are directly decided against the Plaintiff, it cannot be *presumed* that the remaining questions are substantial, or that such claims are related to Plaintiff's ultimate success. In this case, the Respondent presented evidence *on each and every constitutional claim*. Indeed, comprehensive Interrogatories were served upon Petitioner, and the Answer to the Interrogatories were made part of the record by the Respondent. Testimony was elicited at the hearing on the preliminary injunction concerning those claims.

In *Smith* v *Robinson*, __ U.S. __, 82 L Ed 2d 746, 759, 104 S Ct 3457 (1984), the Supreme Court noted that "[i]f a litigant could obtain fees simply by an incantation of Sec. 1983, fees would become available in almost every case." The Court went on to observe:

> In light of the requirement that a claim for which fees are awarded be reasonably related to the Plaintiff's ultimate success, it is clear that Plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. *Closer examination of the nature of the claims* and the relationship between

those claims and Petitioner's ultimate success *is required.*

Id, at 762.

Where the Court has, in fact, decided and denied *some* of the constitutional law questions presented, and the case has been settled on the basis of the Court's Opinion, it would seem to be clearly required by *Smith* that the Court *look to the record* to determine whether remaining claims are substantial.

Certainly, the *Smith* case mandates the Court to closely examine the relationship between Plaintiff's success and the fee-generating claim.

Where the District Court has taken extensive evidence on the State law claim, and the important constitutional law claims, it would seem to be clear that the Court *must* look at the record as it existed at the time of entry of a Consent Judgment to determine the "substantiality" of remaining claims and their relationship to the Plaintiff's ultimate success.

The Circuit Court, in ruling that the District Court could not look behind the pleadings, has, in effect, ruled that the "mere incantation" of Section 1983 is the basis for an attorney fees award. This is plainly contrary to the holding in the *Smith* case, and the other cases cited in Petitioner's Circuit Court Brief. The ruling clearly conflicts with applicable decisions of this Court. The dissenting Opinion filed by Judge Engel adopts the correct rule.

As recognized by the District Court, the cases are unanimous in holding that a plaintiff in a joint fee and nonfee case may recover attorney fees as costs in a nonfee claim despite the fact that the Court may not have decided the fee claim. *See, Maher* v *Gagne,* 448 U.S. 122

(1980). This rule has been followed, not only because of congressional intent, but because the Courts have recognized that very often a Court will decide a case on a pendent noncivil rights claim when to do so will allow it to avoid an unnecessary decision on a difficult constitutional issue. *Williams* v *Thomas*, 692 F2d 1032, 1036 (CA 5, 1982).

It is equally clear that a party is not entitled to an award of attorney fees as costs when it prevailed on the pendent State law claim but *lost* on the fee-generating constitutional or federal claim. *Milwe* v *Cavuoto*, 653 F2d 80, 84 (CA 2, 1981); *Haywood* v *Ball*, 634 F2d 740 (CA 4, 1980); *Roley* v *Fraser*, 747 F2d 287 (CA 5, 1984); *McDonald* v *Doe*, 748 F2d 1055 (CA 5, 1984).

The District Court correctly decided that a plaintiff in a joint fee, nonfee case must satisfy three criteria in order to recover attorney fees. First, the fee and nonfee claims must have arisen out of a "common nucleus of operative fact." *See, Maher* v *Gagne*, 448 U.S. 122, 132, n. 15, *citing*, HR Rep No 94-1558, p. 4, n. 7 (1976); *See also, United Mine Workers* v *Gibbs*, 383 U.S. 175 (1966) and *Seals* v *Quarterly County Court, etc*, 592 F2d 390, 393 (CA 6, 1977).

Second, assuming the Court addressed the fee claim, the plaintiff must have prevailed in his fee claim or, assuming that the Court failed to resolve the fee claim, a substantial question regarding the fee claim must remain following the resolution of the case. *See, Maher*, 448 U.S. at 132, n. 15 and *Smith* v *Robinson*, __ U.S. __, 82 L Ed 2d 746, 104 S Ct 3457 (1984). With regard to this second criteria, a plaintiff in such case is not entitled to a full hearing into the merits of his fee claim. Rather, the Court is required only to determine whether a substantial issue remains as to plaintiff's fee claim. *See generally,*

Huffman v *Hart*, 576 F Supp 1234, 1236 (NS Ga, 1983), *citing*, *Morales* v *Haines*, 486 F2d 880, 881 (CA 7, 1973).

Finally, a reasonable relationship must exist between the fee claim and plaintiff's ultimate success. *See*, *Smith* v *Robinson*, *supra*, 82 L Ed 2d at 762; *Id*, at 762, n. 10; and *Id*, at 763, n. 12.

Respondent claimed that the District Court should not have "resolved" the constitutional questions remaining concerning the validity of Sections 2, 6, 7, 9, 10, 11, 12 and 13 of the Ordinance, after the Consent Judgment "failed to resolve those claims." Under the requirements of *Maher* and *Smith*, Clay Township believes that the Court *must* determine whether a substantial constitutional question remains unresolved in a case such as this one. In *Wabasha* v *Solem*, 580 F Supp 448, 455 (DC SD, 1984), and *Reel* v *Arkansas Dep't of Corrections*, 672 F2d 693, 697 (CA 8, 1982), the Courts recognized the authority of a Court in such a case to inquire into the outcome of the litigation to determine whether or not the plaintiff essentially prevailed. Certainly, in this case, where the primary question facing the Court was whether Seaway's challenge to Sections 2, 6, 7, 9, 10, 11, 12 and 13 of the Ordinance left an *unaddressed*, substantial constitutional question, *after entry of the consent Order*, the Court must look at the record.

Seaway claims that it is the *application* of Sections 2, 6, 7, 9, 10, 11, 12 and 13 to its drive-in theater operations that create the unaddressed substantial constitutional question. This argument is premised on the claim that Clay Township enacted Ordinance 77 for the purpose of putting Seaway out of business. As noted by the District Court, ". . . a careful review of the record reveals that there is no evidence in this case to support that claim," and ". . . in its Answer to Interrogatories, numbers 41-57, the Defendant clearly and precisely sets forth its

reasons for enacting Ordinance 77, *and none of the evidence in the record challenges those reasons."*

Respondent complained that the District Court should not have resolved the fee-generating federal constitutional issues "left unresolved by the Consent Judgment." As pointed out in *McDonald, supra,* p. 1056, a party is entitled to fees only when the party prevails in a pendent State law claim that is related to a *substantial, undecided* fee claim. As the District Court properly recognized in its analysis, since Respondent did not prevail on any *addressed* constitutional issue, it became necessary to determine whether any remaining issues involved an unaddressed substantial constitutional question. As a result of the parties' consent, Respondent's damage claim had been dismissed with prejudice, and the temporary injunctive Order made permanent. This determination could only properly be made by looking at the record as it existed on the date of the Consent Judgment.

While the District Court did elaborate somewhat on the determination that Sections 2, 6, 7, 9, 10, 11 and 12 were content neutral health and safety regulations which apply to all drive-in theatres, that finding is grounded squarely on *consented-to* language in the Court's earlier opinion of January 16, 1984, where it was stated on page 7, that "the sections of Ordinance NO. 77 *all* appear to be valid regulatory provisions."

The record, at the point in time that the Consent Judgment was entered, contained all of the relevant information for determining whether a *substantial* unaddressed constitutional operation remained.

It seems beyond any legitimate dispute that the relief which Respondent obtained is directly and solely attributable to its State law claims. The constitutional objections raised by Respondent that the Petitioner could not

require screening of "films viewable from a public highway, and screening of sexually explicit films viewable from private residences" were decided in the Township's favor. As such, under *Smith* v *Robinson*, __ U.S. __, 82 L Ed 2d 746, 104 S Ct 3457 (1984), no reasonable relationship exists between the fee claim and Plaintiff's ultimate success, and accordingly, no fee can be awarded.

CONCLUSION

Respondent is not entitled to an award of attorney fees because it was not a "prevailing party" when it prevailed only on the pendent State law claims, but lost on the constitutional claims. Inasmuch as there were no unaddressed, substantial constitutional law questions remaining after the Court's Order of August 31, 1984, and inasmuch as the relief obtained by Respondent was unrelated to the fee-generating claim, no award of attorney fees should be made. The Circuit Court's decision in this regard was erroneous, and it should be reversed.

RELIEF REQUESTED

WHEREFORE, CLAY TOWNSHIP requests this Court enter its Order reversing the decision of the Circuit Court.

Respectfully submitted,

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Dated: August 8, 1986

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed May 19, 1986)

(SEAWAY DRIVE-IN, INC., Plaintiff-Appellant, v. TOWNSHIP OF CLAY, Defendant-Appellee — ON APPEAL from the United States District Court for the Eastern District of Michigan; Docket No. 85-1353)

Before: ENGEL, KENNEDY and CONTIE, Circuit Judges. KENNEDY, Circuit Judge, delivered the opinion of the court, in which CONTIE, Circuit Judge, joined. ENGEL, Circuit Judge, (p. 16) delivered a separate dissenting opinion.

KENNEDY, Circuit Judge.

Plaintiff-Appellant appeals the District Court's denial of its motion for attorney's fees under 42 U.S.C. § 1988. The underlying lawsuit involved both state law and constitutional challenges to a township ordinance regulating drive-in theaters. During the preliminary injunction proceedings, which led to settlement of the case through a consent decree, the District Court refrained from discussing the merits of some of the claims that could have given rise to an attorney's fee award under section 1988. The issue on appeal is whether the District Court erred in its holding at a subsequent hearing on the attorney's

fees motion that attorney's fees could not be awarded based on those unaddressed claims because they did not raise a substantial constitutional question and were not reasonably related to appellant's ultimate success.

Appellant is a drive-in movie theater located in Clay Township, Michigan. In 1982, appellant sued appellee, Clay Township, to enjoin enforcement of section 1304 (3)(h) of Clay Township Zoning Ordinance No. 25, which prohibited the showing of certain sexually explicit movies. The District Court entered a preliminary injunction against the enforcement of the ordinance on August 19, 1982. *Seaway Drive-in, Inc.* v. *Township of Clay*, No. 82-30051 (E.D. Mich. Aug. 19, 1982) (*"Seaway I"*). The District Court stated that appellant was likely to succeed on the merits of its first amendment challenge to the ordinance.[1]

In November 1982, the township enacted Ordinance 77, a comprehensive ordinance regulating drive-in theaters. On March 3, 1983, appellant initiated this action. The complaint alleged that the new ordinance violated the first, fifth and fourteenth amendments to the United States Constitution and that its application to appellant violated Michigan's Township Zoning Enabling Act, M.C.L.A. §§ 125.271, *et seq.*, and 125.286, *et seq.* The District Court preliminarily enjoined enforcement of eight of the twelve substantive provisions of the ordinance, on the basis that they violated state law when applied to appellant.[2] *Seaway Drive-in, Inc.* v. *Township of Clay*, No. 83-9025 (E.D. Mich. Jan. 16, 1983) (*"Seaway II"*).

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[1] By consent of the parties and order of the court, dated August 8, 1984, the court's order and opinion were made a final judgment and a permanent injunction.

[2] These eight provisions were: section 2 (requiring a perimeter fence to intercept wind blown trash and prevent automobile headlights from shining on adjoining property); section 6 (regulating the

(*Continued on page A-3*)

Thus, the court did not address the constitutionality of those eight provisions. *See Seaway I & II*, Nos. 82-30051, 83-9025, slip op. at 5 (E.D. Mich. March 25, 1985) (fees opinion). As to the other four substantive provisions, the court first noted that appellant did not challenge two and then declined to enjoin enforcement of the other two because appellee was likely to prevail at trial on its position that the provisions were constitutionally sound and did not run afoul of state law.[3]

By consent of the parties and order of the court, dated August 31, 1984, the District Court's opinion and order were made a final judgment and a permanent injunction. Appellant then requested costs and attorney's fees in both *Seaway I* and *Seaway II*. The District Court granted appellant's request with respect to *Seaway I*, but denied the request for $20,085.80 in *Seaway II*.

(*Continued from page A-2*)

placement and construction of outdoor lighting structures); section 7 (regulating the volume and intensity of noise); section 9 (regulating the size, placement and material composition of driveways); section 10 (requiring dust control treatments); section 11 (requiring the collection of debris and waste); section 12 (requiring the filing of food inspection reports); and section 13 (requiring the paving of certain surfaces in the vicinity of food concession establishments).

Each of these sections was found to violate appellant's vested rights possessed under Michigan law as a prior nonconforming use.

[3] The two provisions that went unchallenged were section 4 (prohibiting the exhibition of films visually depicting certain sexual conduct by persons under the age of 18) and section 5 (prohibiting the exhibition, to minors, of films containing certain sexually explicit material). The two that the District Court found likely to survive both constitutional and state law attack were section 3 (prohibiting the exhibition of films containing certain sexually explicit material where the exhibition is viewable from any residential dwelling) and section 8 (requiring the film screen to be placed or shielded such that it is not viewable by motorists using a public highway or road). The District Court found that section 3 is no broader than necessary to protect the privacy of those living near the theaters and that section 8 is a content-neutral regulation that advances a government interest in preventing traffic problems on nearby roads.

Appellant's request for fees is based on 42 U.S.C. § 1988:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Appellant's position is that it instituted an action to "enforce" section 1983 (its constitutional claims) and it prevailed in that action (*i.e.*, it succeeded in enjoining eight of the twelve substantive provisions of the township ordinance). Appellee responds, and the District Court agreed, that there was no substantial question as to the constitutional validity of the ordinance provisions whose enforcement appellant succeeded in enjoining and that no reasonable relationship existed between the fee claims and appellant's ultimate success.

Appellant's request for attorney's fees arises in a somewhat anomalous context. Appellant alleged two types of claims against appellee: constitutional (section 1983) claims and state law claims. If appellant had asserted only its section 1983 and prevailed, it would have been entitled to attorney's fees under section 1988.[4] Had appellant not asserted a section 1983 claim, but instead asserted only the state law claims,[5] or a federal law claim that is not listed in section 1988, and prevailed, it would not have been entitled to attorney's

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[4] Such claims are often referred to as "fee claims."

[5] Of course, if appellant's only claims arose under state law, it would not have been in federal court unless there was diversity of citizenship. *See* 28 U.S.C. § 1332.

fees.[6] Appellant asserted both fee and non-fee claims in its complaint. The trial court, to the extent that it reached the merits, only addressed the non-fee claim, because appellant succeeded on that claim, and the court, following well-settled doctrine, refused to comment unnecessarily on the constitutional issues raised by the fee claim. Appellant has prevailed in action to enforce a fee claim, but, for reasons unrelated to the merits of that claim, the fee claim has not been addressed.[7]

The Supreme Court addressed this type of situation in *Maher* v. *Gagne*, 448 U.S. 122 (1980). Plaintiff filed a section 1983 suit challenging Connecticut's federally funded Aid to Families with Dependent Children program. The complaint alleged violation of the Social Security Act and the equal protection and due process clauses of the fourteenth amendment. Plaintiff invoked jurisdiction under 28 U.S.C. § 1343. The suit itself ultimately was settled favorably to plaintiff. Defendant argued that section 1988 did not authorize the award of attorney's fees in a section 1983 action unless section 1983 was being invoked as a remedy for a constitutional violation or for violation of a federal statute providing for the protection of civil rights or equal rights. The Court rejected such a limita-

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[6] Such claims are often referred to as "non-fee claims."

[7] The trial court only reached the merits at the stage of a preliminary injunction. At that point, the case was settled by the parties with the court's consent. This fact does not affect the determination that appellant prevailed in its action. Congress did not intend to have the authority to award fees extinguished by the fact that the case was settled. See *Smith* v. *Robinson*, 104 S. Ct. 3457, 3466 (1984). Also, so long as the party has prevailed on the case as a whole, it is entitled to fees for all time reasonably spent on the matter. *Northcross* v. *Board of Ed.*, 611 F.2d. 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). Where success is not complete, the district court should award fees in an amount that is reasonable in relation to the results obtained. *Hensley* v. *Eckerhart*, 461 U.S. 424, 440 (1983). Here, appellant was successful in permanently enjoining enforcement of eight provisions of the township ordinance.

tion to section 1988, but noted initially that plaintiff "did allege constitutional claims which the District Court and the Court of Appeals both found to be sufficiently substantial to support federal jurisdiction under *Hagans* v. *Lavine*, 415 U.S. 528." *Maher*, 448 U.S. at 128 n. 10. Thus, the Court pointed out, even if defendent correctly interpreted section 1988, plaintiff still would have been entitled to fees based on her "sufficiently substantial" constitutional claims.

> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H. R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> > To the extent a plaintiff joins a claim under one of the statutes enumerated in H. R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding fees. *Morales* v. *Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive, *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans* v. *Lavine, supra; United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though

> the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers* v. *Gibbs*, *supra*, at 725.
>
> H. R. Rep. No. 94-1558, p. 4, n. 7 (1976).

448 U.S. at 132, n. 15. Three Justices declined to join the part of the majority opinion examining the question whether section 1988 allows an award of fees for prevailing on a federal non-civil-rights statutory claim. They found that portion unnecessary because they agreed with the majority that the complaint "alleged 'substantial' constitutional claims as defined in *Hagans* v. *Lavine*, 415 U.S. 528 (1974)." 448 U.S. at 134 (Powell, J., concurring). "In this case . . . the complaint included a substantial constitutional claim which 'remained in the case until the entire dispute was settled by the entry of a consent decree.'" *Id.* (quoting the majority opinion). Thus, the concurring Justices "ha[d] no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action." *Id.*

The test quoted from the legislative history for determining when fees may be awarded based on an unaddressed fee claim — *i.e.*, the requirements that the fee claim be substantial and that the fee and non-fee claims arise out of a common nucleus of operative fact — is identical to that that a district court must apply when determining whether the court has pendent jurisdiction over state law claims.[8] In the present case, appellant made constitutional challenges to ten of the provisions of Ordinance 77. The only jurisdiction the court could have had over the state law claims, which the court

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[8] In fact, the cases cited by the House Report where the test is set forth are pendent jurisdiction cases.

ruled were likely to be successful as to eight of the provisions, was pendent jurisdiction. If the District Court had pendent jurisdiction over the state law claims, as it presumably found that it did, then the constitutional (fee) claims were "substantial" and the fee and non-fee claims must have arisen out of a "common nucleus of operative fact." *See McDonald* v. *Doe*, 748 F.2d 1055, 1056-57 (5th Cir. 1984), *reh'g denied*, 753 F.2d 1075 (1985) (en banc). In other words, to hold that the constitutional claims in this case were not substantial is to hold that the District Court did not have jurisdiction over the state law claims at the time it entered the consent decree. The District Court applied a more stringent "substantiality" test than this and improperly denied the fee request.

The complaint attacked the ordinance as a whole on several constitutional grounds. First, it alleged that the purpose of the ordinance was to put appellant out of business and prevent it from showing sexually explicit material. Second, it alleged that the ordinance contained content-based speech restrictions. Third, it claimed that the ordinance gave the township arbitrary and uncontrolled discretion; fourth, that it was overly vague and broad; fifth, that it violates the equal protection clause, and sixth, that it is an unconstitutional taking. The District Court, in its fees opinion, found that, based on the record before it, these claims were not substantial. It found the "improper purpose" claim insubstantial because there was no evidence in the record to dispute appellee's evidence of a proper purpose. The court also concluded that the eight sections would have been upheld as valid exercises of police and zoning powers — *i.e.*, that they were drawn narrowly enough and were essentially content-neutral.

The District Court's error was that it looked at the record at the time of the consent decree to determine, in

effect, whether the constitutional claims could survive a summary judgment motion. For example, the court's finding that appellant's claim that the ordinance was enacted with the purpose of restricting speech content was insubstantial was not based on the ground that such facts, if true, would not state a claim; rather, the court based its finding of insubstantiality on the ground that a review of the record revealed no evidence that there was such an impermissible purpose. The "substantiality" test, however, does not contemplate such an inquiry into the proof behind the pleadings. A claim is insubstantial if it is "obviously without merit" or if "its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans*, 415 U.S. at 537. The claim must be "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." *Id.*, 415 U.S. at 543 (quoting *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666-67 (1974)). This test does not require the claim, in order to be substantial, to be supported by evidence.[9] *See also Seals* v. *Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977) (holding that if a claim is substantial enough to support jurisdiction over a pendent claim, and resolution of the pendent claim completely disposes of the controversy, fees

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[9] The court's conclusion that the provisions were valid exercises of zoning and police powers similarly imposed more stringent requirements than are found in the substantiality test. Appellant alleged that the regulations imposed an undue economic burden on it. The balancing inherent in the court's determination that the provisions were valid requires consideration of the factual circumstances of the particular case based on a well-developed record.

should be awarded regardless of what the record now reveals about the validity of the constitutional claim).

The District Court, in effect, confused the substantiality requirement of pendent jurisdiction, which is mandatory, with the discretionary aspects of pendent jurisdiction. Although it is preferable for a district court to refuse to consider a pendent claim if the claim to which it is appended is dismissed before trial (*e.g.*, pursuant to a Rule 12 or 56, Fed. R. Civ. P., motion), such a discretionary refusal to exercise pendent jurisdiction is unrelated to the mandatory "substantiality" requirement. *Gibbs*, 383 U.S. at 726 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well").Thus, a federal claim that is sufficiently substantial to support jurisdiction over a pendent claim does not become insubstantial, for such purposes, when it is subsequently dismissed before trial. In this case, the District Court, under the guise of determining whether the constitutional claims were substantial, determined that they could not survive a motion for summary judgment.[10]

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[10] Although the court did find that two of the ordinance provisions would survive constitutional challenge, that holding did not affect the substantiality of the constitutional challenges to the other eight provisions. Even if two of the provisions were valid exercises of police and zoning power, it is not necessarily true that the other eight were. This is so especially in light of the court's holding that the eight provisions violated vested rights possessed as a prior nonconforming use, while the other provisions did not. Furthermore, the fact that two of the provisions survived the "improper purpose" challenge does not mean that the eight provisions would. The Magistrate's recommendations avoided such an implication by noting that, assuming there was a bad motive behind the ordinance, the two provisions would survive because appellee could show that those two would have been enacted despite the alleged bad motive. Thus, the Magistrate did not conclude that appellant was unlikely to prevail in proving a constitutional violation, due to improper motive, in the

(*Continued on page A-11*)

The District Court also concluded that appellant's claim for fees was not allowable because the relief appellant ultimately achieved was unrelated to its constitutional challenge to Ordinance 77. "Rather, it was related directly and exclusively to [appellant's] success under its pendent Michigan zoning law theory." *Seaway I & II*, slip op. at 10. This holding is also based on a misapplication of the test for awarding fees in a case involving fee and non-fee claims.

Although the District Court did not explain why it held that appellant's success was not related to its constitutional challenges, it did cite to two recent Supreme Court cases in support of its holding. *Smith* v. *Robinson*, 104 S. Ct. 3457 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). Neither case compels the conclusion that attorney's fees are not awardable in this case.

Smith involved a challenge by a handicapped child and his parents to the school system's decision to deny the child a free public education. Plaintiffs originally appealed the decision to the local school committee and then through the state administrative process. They also filed suit in federal district court against the committee and certain state officials. Plaintiffs had a section 1983 claim (based on the fourteenth amendment's due process and equal protection clauses), a federal civil rights statutory claim (the Rehabilitation Act of 1973), a federal non-civil-rights statutory claim (the Education of the Handicapped Act), and state law claims. The district

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(*Continued from page A-10*)

enactment of the eight sections. The District Court adopted the Magistrate's recommendations in full and did not address the "impermissible purpose" challenge in its opinion. Thus, because there was an issue of fact — regarding appellee's motive — that the District Court never resolved and never needed to resolve, a fee award is permissible.

court ultimately held that plaintiffs were entitled to free public education under state law and therefore found it unnecessary to reach plaintiffs' federal statutory and constitutional claims. The court awarded attorney's fees based on the constitutional claims, which the court found to be colorable and nonfrivolous. The Court of Appeals for the First Circuit reversed.

The Supreme Court first addressed plaintiffs' argument that the unaddressed constitutional claims provided a basis for an award of fees. The Court began by noting that section 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. The Court noted, though, that "[d]ue regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on which effort was expended and the ultimate relief on which effort was expended and the ultimate relief obtained." 104 S. Ct. at 3466. With regard to the specific situation of substantial, unaddressed constitutional claims. the Court reiterated "the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success." *Id.* at 3467.

> In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required.

Id.

The *Smith* decision reveals that the relationship requirement is satisfied when, had the fee claim been

addressed and plaintiff prevailed on it, plaintiff would have been entitled to the same relief he received absent consideration of the fee claim. "[Section 1988] simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success." *Id.* (footnote omitted). In *Smith*, the Court held that the fee claims were unrelated to plaintiffs' ultimate success. The first fee claim alleged a denial of due process because the School Board refused to grant a full hearing before terminating the child's funding. The Court held that although plaintiffs succeeded in obtaining an injunction to prevent that violation, it was unrelated to their ultimate success and was unrelated to the substantive claims made in those proceedings. Plaintiffs' ultimate success depended on an interpretation of state law; and the due process remedy did not assure them that the law would be interpreted to require funding.

Plaintiffs in *Smith* also made a due process challenge to the impartiality of the state hearing officer. The Court noted that plaintiffs' due process claim only sought relief from further hearings under the regulation permitting impartial hearing officers.

> That due process claim and the substantive claim on which [plaintiffs] ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief. . . . The efforts [plaintiffs] subsequently expended in the judicial process addressed only the substantive question as to which agency, as a matter of state and federal law, was required to pay for Tommy's education. Whether or not the state procedures accorded [plaintiffs] the process they were due had no bearing on that substantive question.

Smith, 104 S. Ct. at 3471.[11] The Court's warning about the danger of a contrary holding, *see Smith*, 104 S. Ct. at 3471, was aimed at such a claim — *i.e.*, one where a plaintiff seeks review of an adverse agency determination on a substantive non-fee issue and seeks attorney's fees by virtue of a due process attack on the adminstrative proceedings themselves.

The instant case, by comparison, involves a single request for relief based on alternative legal theories — a state law theory and a constitutional law theory. The District Court's jurisdiction over the state law claims was based, in part, on the fact that they and the constitutional law claims arose out of a common nucleus of operative fact. Thus, as the legislative history cited in *Maher* indicates, there is a sufficient relationship between the two claims to permit an award of attorney's fees based on the constitutional claims.

The *Hensley* case, which the Court relies on in *Smith*, does not compel a different conclusion. *Hensley* makes clear that the purpose of the "relationship between the claims" element of the fees award test is to prevent the award of fees in those cases where the fee and non-fee claims are aimed at achieving different results or where they are based on different facts *and* different legal theories.

> It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only

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[11] Plaintiffs also made an equal protection claim of right to a publicly financed education for the child. The Court viewed this claim as virtually identical to the Education of the Handicapped Act claim and went on to conclude that Congress did not intend to allow reliance on § 1983 as a remedy for such an equal protection claim — the Act is the sole avenue and it does not provide for attorney's fees. *Smith*, 104 S. Ct. at 3468-70.

> a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See *Davis* v. *County of Los Angeles*, [8 E.P.D. ¶ 9444, at 5049 (C.D. Cal. 1974)]. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley, 461 U.S. at 435 (footnote omitted). As noted above, appellant's fee and non-fee claims involved a common core of facts, certain of the claims were based on related theories,[12] and the fee and non-fee claims were aimed at achieving the same relief.

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[12] For example, appellant's fourteenth amendment "takings" claim is related to the claim that the new ordinance deprived appellant of vested rights possessed under state law as a prior nonconforming use. The District Court's fee opinion did not address the substantiality of that constitutional claim.

In sum, the District Court erred in applying an incorrect standard when determining the substantiality of appellant's constitutional claims. The court also erred in concluding that appellant's constitutional claims were not related to its ultimate success. The case is remanded for a determination of the appropriate amount of attorney's fees to be awarded in *Seaway II*, in light of the results achieved by the consent decree in that case.

APPENDIX B

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated March 25, 1985)

(SEAWAY DRIVE-IN, INC., Plaintiff, -vs- TOWNSHIP OF CLAY, Defendant — CIVIL ACTION NOS. 82-CV-30051, 83-CV-9025)

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 25th day of March, 1985.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

The Court now has before it plaintiff's request for attorney fees in two cases which it brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of two separate zoning ordinances of Clay Township. The Court will refer to these cases as *Seaway I* and *Seaway II*.[1] The facts of *Seaway II* raise the difficult issue of when a plaintiff is entitled to an award of attorney fees in a case which was brought under both fee and non-fee claims.

In *Seaway I*, the plaintiff sued to enjoin the enforcement of Section 1304(3)(h) of Clay Township Zoning Ordinance, number 25. That ordinance prohibited the plaintiff from exhibiting x-rated movies at its drive-in movie theatre. That matter was referred to United States

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[1] For ease of reference, the Court will refer to *Seaway Drive-In, Inc.* v. *Township of Clay*, number 82-CV-30051-PH as *Seaway I* and to *Seaway Drive-In, Inc.* v. *Township of Clay*, number 83-CV-9025 PH as *Seaway II*.

Magistrate Paul J. Komives who issued a report and recommendation which this Court adopted in full. The Court concluded that Section 1304(3)(h) was facially overbroad and that a preliminary injunction should issue enjoining its enforcement. By consent of the parties and order of the Court dated August 8, 1984, that opinion was made a final judgment and permanent injunction.

Following the Court's decision in *Seaway I*, Clay Township enacted Ordinance 77, a comprehensive ordinance regulating drive-in movie theatres. Ordinance 77 contained 12 substantive regulations which the plaintiff challenged in *Seaway II*. The pllaintiff's challenge was based both on federal constitutional grounds and on Michigan zoning law. This matter was also referred to Magistrate Komives who issued a thorough report and recommendation. Following a hearing for preliminary injunction which lasted two days, the Magistrate recommended that the enforcement of certain portions of Ordinance 77 be enjoined. After careful review of the objections to that report, the Court adopted the Magistrate's recommendation in full.

By consent of the parties and order of the Court dated August 31, 1984, that order became the final judgment in that case and the preliminary injunction was made permanent. Plaintiff now requests costs and attorney fees in both *Seaway I* and *Seaway II*. Plaintiff requests $5,249.50 for legal services rendered in *Seaway I* and a total of $20,085.80 for costs and attorney fees in *Seaway II*.

Title 42 U.S.C. § 1988 provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Accordingly, in determining whether an award of costs is appropriate, the Court must first determine whether the plaintiff is a prevailing party within the meaning of Section 1988.

In the instant action, the defendant has filed no response brief to plaintiff's request for attorney fees in *Seaway I*. The defendant has objected, however, to plaintiff's request for attorney fees in *Seaway II* on the basis that the plaintiff is not a prevailing party. Accordingly, the Court will limit its discussion as to whether the plaintiff is a prevailing party to *Seaway II*.

In considering the plaintiff's challenges to Ordinance 77 in *Seaway II*, the Court directly addressed the constitutionality of only four of the twelve provisions which the plaintiff challenged. Because the Court found that the plaintiff was likely to prevail on his pendent state claim in regard to the remaining eight regulations, the Court refrained from discussing their constitutionality.

In its opinion, the Court only addressed the constitutionality of Sections 3, 4, 5 and 8 of Ordinance 77. These four regulations require drive-in movie theatres which are exhibiting sexually explicit material to erect a screening fence to protect local residents from becoming a captive audience. They prohibit the exhibition of any film which depicts sexual conduct by children under the age of 18 years and forbid the admission of minors to sexually explicit movies. Finally, they require all drive-in theatres to obscure their movie screens from the view of passing motorists on major thoroughfares as defined in the ordinance.

After considering both the plaintiff's federal constitutional and state law arguments, the Court concluded that the plaintiff was not likely to prevail ultimately on its challenge to these portions of Ordinance 77. Therefore, the Court did not enjoin the enforcement of these regulations and they remain in full effect today.

Although the Court upheld Sections 3, 4, 5, and 8 of Ordinance 77, it did enjoin the enforcement of Sections

2, 6, 7, 9, 10, 11, 12 and 13. The Court did so on the basis that the enforcement of those eight regulations would deprive the plaintiff of vested rights it possessed under Michigan zoning law as a prior nonconforming use. Unlike Sections 3, 4, 5, and 8, these eight provisions apply uniformly to all drive-in movie theatres in Clay Township. These regulations are content neutral and do no more than limit the amount of noise, light and debris pollution which may eminate from a drive-in theatre.

Although the plaintiff partially succeeded on its non-fee pendent state claim, the defendant argues that the plaintiff in *Seaway II* is not a prevailing party within the meaning of 42 U.S.C. § 1983. The defendant claims that the plaintiff altogether failed on its federal constitutional fee claims. In support of its argument, the defendant cites the following language from page 12 of the Magistrate's report and recommendation:

> Pending a more thorough examination of this issue at a trial on the merits, I suggest that plaintiff has shown a sufficient probability of success to justify the conclusion that sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ordinance No. 77, as applied to plaintiff, operate to impermissibly *deprive plaintiff of vested rights which it possesses by virtue of its prior nonconforming use. I note that these sections would not be impermissible as applied to drive-in theatres which may wish to locate in Clay Township in the future, but in plaintiff's case would accomplish something that can only be done through eminent domain or condemnation.* (Emphasis in original.)

Nevertheless, the Michigan citations which follow this language make clear that the Court was indicating that Ordinance 77 could be applied to other drive-in theatres which locate in Clay Township in the future without

offending *Michigan zoning law*. The Court will note that it chose not to address directly the constitutionality of these provisions because it found that the pendent non-constitutional claim was dispositive. *See, Hagans* v. *Lavine*, 415 U.S. 528, 545-49 (1974).

Bearing the history of this case in mind, the Court must now determine whether the plaintiff is entitled to an award of attorney fees in *Seaway II*. The United States Supreme Court has addressed the propriety of attorney fees in joint fee and non-fee cases in a limited number of cases. In a footnote to its decision in *Maher* v. *Gagne*, 448 U.S. 122 (1980), the Court wrote:

> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
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> > "To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, the plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales v. Haines, 486 F2d 880 (7th Cir 1973). In some instances, however, the claim with fees may involve a constitutional question, which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 US 528 [39 L Ed 2d 577, 94 S Ct 1372] (1974). In such cases, if the claim for which fees may be

> awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 US 715, [16 L Ed 2d 218, 86 S Ct 1130] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725, [16 L Ed 2d 218, 86 S Ct 1130]." HR Rep No. 94-1558, p. 5, n. 7 (1976).

Maher v. *Gagne*, 448 U.S. at 132, n. 15.

Although neither attorney in this case appears to have researched more recent Supreme Court authority in this area, the Court has. In doing so, the Court has concluded that the *Maher* footnote cannot be read in isolation. Rather, it must be considered in connection with the Supreme Court's recent decisions in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) and *Smith* v. *Robinson*, ___ U.S. ___, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984).

The petitioner in *Smith* v. *Robinson, supra,* suffered from cerebral palsy and sued to obtain "free appropriate public education." The petitioner initiated the action in federal district court pursuant to both the Education of the Handicapped Act (EHA), 84 Stat. 175 (1975) (codified as amended at 20 U.S.C. §§ 1400 *et seq.*) (1976) and under 42 U.S.C. § 1983. Having achieved most of the relief sought in the lower court proceedings, the petitioner sought attorney fees under 42 U.S.C. § 1983. The specific question before the Supreme Court was the propriety of such an award.

In *Smith,* the petitioner claimed that, in disallowing the District Court's award of attorney fees, the Court of

Appeals had "simply ignored the guidance of this Court in Maher v. Gagne, supra, that a prevailing party who asserts substantial but unaddressed constitutional claims is entitled to attorney's fees under 42 U.S.C. § 1988 . . . ." *Smith*, 82 L. Ed. 2d at 760. The Supreme Court rejected that argument and, in doing so, re-affirmed many principles which are applicable in the case now before this Court. While the Supreme Court ultimately concluded that, in enacting the EHA, Congress intended to preclude reliance on § 1983, *Id.* at 765, this Court does not believe that that fact alone diminishes the value of *Smith*. Indeed, many of the Supreme Court's statements in *Smith* were statements of general applicability.

As an initial observation in *Smith*, the Supreme Court noted that "[i]f a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case." *Id.* 759. By that language, the Court was clearly indicating that it disapproved of such a view of § 1983. The Court went on to make two important observations which are directly relevant to this case. First, the Court noted that

> In light of the requirement that a claim for which fees are awarded be reasonably related to the plaintiff's ultimate success, it is clear that plaintiffs may not rely simply on the fact that substantial fee-generating claims were made during the course of the litigation. Closer examination of the nature of the claims and the relationship between those claims and petitioners' ultimate success is required.
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> *Id.* at 762.

Shortly thereafter, in a footnote, the court wrote:

> where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, Hensley v. Eckerhart, supra, re-

> quires that fees not be awarded on the basis of those claims.
>
> *Id.* at 763, n. 12.

Without examining the cases in great detail, the Court will note that the decision in *Smith* had been suggested in the Court's earlier opinions in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) and *Blum* v. *Stenson*, __ U.S. __, 75 L. Ed. 2d 891, 104 S. Ct. 1541 (1984). As the Court noted in *Smith*, *Hensley* and *Blum* recognized that

> the authority to award fees in a case where the plaintiff prevails on substantial constitutional claims is not without qualification. Due regard must be paid, not only to the fact that a plaintiff "prevailed," but also to the relationship between the claims on which effort was expended and the ultimate relief obtained . . . . Thus, for example, fees are not properly awarded for work done on a claim on which a plaintiff did not prevail and which involved distinctly different facts and legal theories from the claims on the basis of which relief was awarded.
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> *Smith*, 82 L. Ed. 2d at 761 *quoting*, *Hensley* v. *Eckerhart*, *supra*, and *Blum* v. *Stenson*, *supra*.

As with most circuits, a number of courts in the Sixth Circuit have addressed the propriety of attorney fees in joint fee and non-fee cases. Some of these decisions are very recent. *See*, *Seals* v. *Quarterly County Court, Etc.*, 562 F.2d 390 (6th Cir. 1977); *Harrington* v. *Vandalia-Butler Bd. of Ed.*, 585 F.2d 192 (6th Cir. 1978); *Bass* v. *Spitz*, 522 F. Supp 1343 (E.D. Mich. 1981); *Dover* v. *Rose*, 709 F.2d 436 (6th Cir. 1983); and *Shimman* v. *Intern. Union of Operation Eng., Loc. 18*, 744 F.2d 1226 (6th Cir. 1984).

After examining the Supreme Court's opinions in *Maher*, *Hensley* and *Smith*, *supra*, and the relevant Sixth

Circuit opinions, the Court reaches the following conclusions relevant to the case now before it. Initially, the Court will note that the cases are unanimous in holding that a plaintiff in a joint fee and non-fee case may recover on a non-fee claim despite the fact that the Court may not have decided the fee claim. *See, Maher* v. *Gagne*, 448 U.S. 122 (1980); *Seals* v. *Quarterly County Court, Etc.*, 562 F.2d 390 (6th Cir. 1977). Additionally, attorney fees are to be awarded liberally to effectuate congressional content. *Id.* Nevertheless, a plaintiff may only recover such an award of attorney fees in appropriate cases. In order to recover attorney fees, the Court must be satisfied that the plaintiff's case satisfies the cumulative criteria of *Maher, Hensley* and *Smith, supra.*

The Court believes that *Maher, Hensley,* and *Smith* require that a plaintiff in a joint fee, non-fee case satisfy three criteria in order to recover attorney fees. First, the fee and non-fee claims must have arisen out of a "common nucleus of operative fact." *See, Maher* v. *Gagne*, 448 U.S. 122, 132, n. 15 *citing*, HR Rep No. 94-1558, p. 4, n. 7 (1976); *See also, United Mine Workers* v. *Gibbs*, 383 U.S. 175 (1966) and *Seals* v. *Quarterly County Court, Etc.*, 592 F.2d 390, 393 (6th Cir. 1977).

Second, the plaintiff must have prevailed in his fee claim or, assuming that the Court failed to resolve the fee claim, a substantial question regarding the fee claim must remain following the resolution of the case. *See, Maher*, 448 U.S. at 132, n. 15 and *Smith* v. *Robinson*, __ U.S. __, 82 L. Ed. 2d at 761, __ S. Ct. __. The Court will note in regard to this second criteria that it does not believe that a plaintiff in such a case is entitled to a full hearing into the merits of his fee claim. Rather, the Court is required only to determine whether a substantial issue remains as to plaintiff's fee claim. *See generally, Huffman* v. *Hart*, 576 F. Supp 1234, 1236 (N.D. Ga. 1983),

citing, Morales v. *Haines,* 486 F.2d 880, 881 (7th Cir. 1973).

Finally, a reasonable relationship must exist between the fee claim and plaintiff's ultimate success. *See, Smith* v. *Robinson, supra,* 82 L. Ed. 2d at 762; *Id.* at 762, n. 10; and *Id.* at 763, n. 12.

Having reviewed the applicable law, the Court finds that the plaintiff is not entitled to an award of attorney fees in *Seaway II.* In reaching this conclusion, the Court will note that it re-read the entire transcript of the proceedings before Magistrate Komives. Additionally, the Court re-read the Magistrate's recommendation of judgment, re-examined the exhibits in this case, and considered carefully the arguments of counsel. The Court finds that the plaintiff is not entitled to an award of attorney fees for two reasons. First, the Court finds that no substantial constitutional question remained regarding the constitutionality of Ordinance 77 following the resolution of this matter. Additionally, the Court finds that the relief which the plaintiff ultimately achieved in this case was unrelated to its constitutional challenge to Ordinance 77. Rather, it was related directly and exclusively to plaintiff's success under its pendent Michigan zoning law theory.

In addressing the plaintiff's request for attorney fees, the Court judged the substantiality of its federal constitutional claims as of the date of the consent agreement making the preliminary injunction in this case the final judgment. Only by examining the case as of that date could the Court take into account its previous rulings in regard to Sections 3, 4, 5, and 8 of Ordinance 77, the evidence presented to the Magistrate and the interrogatories answered by the defendant.

A review of Sections 2, 6, 7, 9, 10, 11, 12 and 13 reveals that they are content neutral health and safety

regulations which apply equally to all drive-in theatres. These sections are not limited in their application to theatres exhibiting sexually explicit materials. Section 2, for example, requires all drive-in theatres to erect a perimeter fence to intercept wind blown trash and to prevent the headlights of cars at the theatre from disturbing adjacent landowners. Similarly, Section 6 requires drive-in theatres to shield lighting structures from shining onto either adjacent property or public highways. Section 7 requires all drive-in theatres to regulate the volume of their movie soundtracks so as to avoid disturbing the peace. Section 9 sets forth requirements for egress and ingress driveways. Section 10 requires drive-in theatres to regulate dust arising from any unpaved driveways. Section 11 requires debris to be collected and properly disposed of. Finally, Sections 12 and 13 regulate the service of food at drive-in movie theatres.

In its complaint, the plaintiff alleged that Clay Township enacted Ordinance 77 for the purpose of putting it out of business. Nevertheless, a careful review of the record reveals that there is no evidence in this case to support that claim. Indeed, during the hearing for preliminary injunction, the plaintiff failed to examine any member of the township board save the town clerk. In reviewing the transcript, it is also clear that the great majority of the evidence plaintiff presented at the hearing went to its challenge to Sections 3 and 8. In its answers to interrogatories, numbers 41-57, the defendant clearly and precisely set forth its reasons for enacting Ordinance 77 and none of the evidence in the record challenges those reasons.

While the Court resolved the challenges to Sections 2, 6, 7, 9, 10, 11, 12, and 13 on the basis of the plaintiff's pendent state claims, that fact does not demonstrate *ipso*

facto that a substantial constitutional question remains. Indeed, the Court must conclude that no substantial constitutional question remains as to the fact that Sections 2, 6, 7, 9, 10, 11, 12, and 13 are valid exercises of the state's zoning and police powers. *See, Euclid* v. *Amber Realty Co.*, 272 U.S. 365 (1926); *Moore* v. *East Cleveland*, 431 U.S. 494 (1977); *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976); and *Erznoznick* v. *City of Jacksonville*, 422 U.S. 205 (1975).

Accordingly, because the Court finds that no substantial question remains as to the constitutionality of Ordinance 77 and because the Court finds that the relief plaintiff obtained was unrelated to its fee claim, the plaintiff's request for attorney fees pursuant to 42 U.S.C. § 1988 in *Seaway II* is DENIED.

The plaintiff has also requested $5,249.50 for legal services rendered in *Seaway I*. Because it is clear that the plaintiff was a prevailing party under 42 U.S.C. § 1983 in *Seaway I*, the Court need only determine whether the requested attorney fees are reasonable.

The leading case in this circuit for calculation of attorney fees is *Northcross* v. *Bd. of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). *Northcross* enunciates a basic formula for fee calculation; the Court is required to multiply the number of hours of service by a reasonable hourly rate. This establishes a base attorney's fee. Once the base fee has been set, the Court may then consider the intangibles or special circumstances which justify applying either a reduction factor or contingency element. Additionally, any out-of-pocket expenses for such items as photocopying, paralegal expenses, or travel and telephone costs, are also recoverable. *Id.* at 636-640.

Relative to establishing a reasonable hourly rate, *Northcross* provides that "the marketplace has set a value

for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney." *Northcross*, 611 F.2d at 638.

Plaintiff's attorney has requested $125.00 per hour as a reasonable rate of compensation for the legal services performed in this case. Considering all of the factors discussed in *Northcross*, in conjunction with the Court's firsthand knowledge of this case, the Court agrees that plaintiff's requested rate of compensation is reasonable. Therefore, the Court finds that plaintiff is entitled to $562.00 in costs and $4,687.50 in attorney fees in *Seaway I*.

ACCORDINGLY, plaintiff's request for costs and attorney fees in *Seaway II* is DENIED. Plaintiff's request for costs and attorney fees in *Seaway I* is GRANTED and plaintiff is awarded $562.00 in costs and $4,687.50 in attorney fees in *Seaway I*.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

APPENDIX C

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated January 18, 1984)

(SEAWAY DRIVE-IN, INC., Plaintiff, v TOWNSHIP OF CLAY, Defendant — Case No: 83 CV 9025 PH)

At a session of said court held in the Federal Building, Bay City, Michigan on the 18th day of January, 1984.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This matter is before the Court on review of the Report and Recommendation of United States Magistrate Paul J. Komives dated April 12, 1983. Magistrate Komives recommends that this Court issue a preliminary injunction prohibiting the Township of Clay from enforcing Sections 2, 6, 7, 9, 10, 11, 12, and 13 of Township Ordinance No. 77. As to the remaining sections of Ordinance No. 77, Magistrate Komives recommends that plaintiff's motion for preliminary injunction be denied. For the reasons stated below, the Court ADOPTS IN FULL the Magistrate's recommendation.

Plaintiff corporation operates a drive-in movie theater in the defendant township. In the past and at present, plaintiff has been in the business of showing films rated G, PG, and R. More recently, plaintiff has begun to show X-rated films at the theatre. This change to the showing of X-rated films initially ran afoul of defendant's Zoning Ordinance No. 25, Section 1304(3)(h). Based on

the Recommendation of Magistrate Paul J. Komives, the Court entered a preliminary injunction on August 19, 1982, enjoining the enforcement of Section 1304(3)(h) of Zoning Ordinance No. 25 pending a full adjudication on the merits.[1] On December 24, 1982, defendant's regulatory Ordinance No. 77 became effective, and it is Ordinance No. 77 which is at issue in this proceeding.

I.
THE NATURE OF ORDINANCE NO. 77

In summary, Ordinance No. 77 would regulate plaintiff's drive-in theater in the following manner:

1.) Ordinance Section 2 requires perimeter fencing at least six feet high to intercept windblown trash and prevent the headlights of patrons' cars from shining on adjacent property;

2.) Ordinance Section 3 prohibits the exhibition of films of a sexually explicit nature[2] unless a screening fence or wall or other obscuring device is erected so that the film is not viewable from any residence;

3.) Ordinance Section 4 prohibits the exhibition of films "that visually depict acts of sexual

---

[1] *Seaway Drive-In Inc.* v *Township of Clay*, 82-30051.

[2] The ordinance's definition of such activity is actually more specific, and classifies the films that are subject to regulation under this section as those that are "characterized by an emphasis on matters depicting, describing or relating to specific sexual activities . . ." "Specific sexual activities" is further defined as:

(a). Human genitals in a state of sexual stimulation or arousal;

(b). Acts of human masterbation (sic), sexual intercourse or sodomy;

(c). Erotic fondling or touching of human genitals, pubic region, buttock or female breast.

conduct . . . by children below the age of 18 years";

4.) Ordinance Section 5 prohibits the exhibition of films to minors if those films contain "sexually explicit matter that is harmful to minors," as defined by state statute;

5.) Ordinance Section 6 requires locating or shielding of lighting structures so that they do not directly shine upon surrounding property or onto public highways so as to create a nuisance;

6.) Ordinance Section 7 requires that the noise of the sound track of a film or other ambient noises "shall not create a disturbance of the peace because of their volume or intensity";

7.) Ordinance Section 8 requires that the drive-in's screen be positioned so that films are not viewable by motorists using any public highway or road, unless a) the films are only viewable from roads where the speed limit is 25 miles-per-hour or less, b) there are light sources, buildings, trees, or other off-site obstructions that obscure the screen from the view of motorists, or c) the screen is only viewable from a road which is illuminated by street lights not more than 250 feet apart "and of such brightness so as to obscure such films or movies so that the same are not viewable by any motorist traveling on any such public highway or road";

8.) Further, the ordinance sets out specific requirements for driveways (§ 9), dust control (§ 10), collection and disposal of debris (§ 11), food service establishment inspection reports

(§ 12), and pavement of areas in the vicinity of food service (§ 13).

The remaining sections of Ordinance No. 77 establish its effective date (§ 14) and repeal any conflicting township ordinances (§ 15). The ordinance also contains a severability clause (§ 16), and provides in section 17 that violations of the ordinance are misdemeanors punishable by a $500 fine or 90 days in jail, or both.

II.

THE NATURE OF PLAINTIFF'S CHALLENGE

Plaintiff's motion for a preliminary injunction claims that plaintiff will suffer irreparable injury by operation of Ordinance No. 77. Plaintiff's attack on the ordinance proceeds on two broad fronts. First, plaintiff argues on state law grounds, claiming that because the theater is a valid nonconforming use, Ordinance No. 77 deprives plaintiff of vested right under Michigan zoning law. Plaintiff's second argument involves constitutional analysis, for plaintiff contends that Ordinance No. 77 is an unjustified regulation of plaintiff's right to show films protected by the First Amendment. This "burden" on plaintiff is alleged to "chill" the exercise of First Amendment rights. Moreover, plaintiff claims that certain sections of Ordinance No. 77 are void for vagueness. Plaintiff has not, however, challenged the validity of Ordinance Sections 4 and 5. Given the severability clause in Ordinance No. 77, Sections 4 and 5 remain enforceable despite any injunction against the enforcement of other sections of the ordinance.

III.

THE DEFENDANT'S POSITION

Defendant asserts that Ordinance No. 77 is a reasonable exercise of its police power. Section 3 of the

ordinance is justified as a "valid regulation of the right of a theater operator to exhibit films depicting specific sexual activities which are viewable from private residences." Section 8 is justified as a content-neutral and valid regulation which is required by the need to alleviate the risk of traffic accidents by motorists who travel northbound on nearby Marsh Road. As to the various sections of Ordinance No. 77 which impose such requirements as perimeter fencing, lighting, noise and paving regulations, the township maintains that they are within its police power even if plaintiff's drive-in is a valid nonconforming use.

IV

THE MAGISTRATE'S RECOMMENDATION AND THE PARTIES' OBJECTIONS TO THE RECOMMENDATION

In a thoughtful and carefully reasoned opinion, Magistrate Komives first addressed the plaintiff's claims based on Michigan zoning law. Magistrate Komives first identified plaintiff's theater as a prior nonconforming use. The Magistrate then held that under Michigan law a nonconforming use may be regulated by a township, so long as the regulatory ordinances are not confiscatory. Applying the law to the facts of this case, the Magistrate found that Ordinance Sections 2, 6, 7, 9, 10, 11, 12, and 13 are confiscatory. Based on this finding, the Magistrate recommended that the Court prohibit the enforcement of Sections 2, 6, 7, 9, 10, 11, 12, and 13 of Ordinance No. 77. Thus, the township would be prohibited from forcing the defendant to erect perimeter fencing, shield lighting structures, and make other improvements to the property. Plaintiff does not object to this finding. Defendant does object, arguing that Sections 2, 6, 7, 9, 10, 11, 12, and 13 are not, in fact, confiscatory.

After disposing of Sections 2, 6, 7, 9, 10, 11, 12, and 13 on state law grounds, the Magistrate analyzed the con-

stitutional objections to Sections 3 and 8 of Ordinance No. 77. The Magistrate found that both Sections 3 and 8 further substantial governmental interests, while imposing incidental restrictions on First Amendment freedoms no greater than what are essential to the furtherance of governmental interests. Thus, the Magistrate recommended that Sections 3 and 8 be upheld. Plaintiff would therefore be prohibited from showing any motion picture of a sexually explicit nature if the film was viewable from a residential dwelling. Further, plaintiff could not show any motion picture if it were viewable from a public highway. While defendant does not attack this recommendation, plaintiff does object, claiming that the township has shown no compelling interest justifying the ordinance and that there are less intrusive means of vindicating whatever interests might exist.

Plaintiff and defendant both filed timely objections to the Magistrate's recommendation, thus requiring this Court to make a de novo review. *United States* v *Walters*, 638 F2d 947 (CA 6, 1981). Indeed, before reaching any conclusions about the Magistrate's recommendation, this Court must review a transcript of the proceedings held by the Magistrate. *Hill* v *The Duriron Company Inc*, 656 F2d 1208 (6th Cir 1981). Having conducted a review of the transcript and considered the objections of both parties, the Court finds support for the Magistrate's factual findings, and affirms his discussion and conclusions of law.

V.
DISCUSSION

Turning first to plaintiff's state claim, it is undisputed that plaintiff's drive-in theater is a valid nonconforming use. Plaintiff therefore has a vested right to continue to use the property in the manner it was used before the

township zoning ordinance was passed. *Dusdal* v *Warren*, 387 Mich 354 (1972). Yet a nonconforming use is not immune to municipal regulation, for the township may address any expansions in the use of a nonconforming use, and may also subject the nonconforming use to valid regulatory ordinances.

Although the Michigan Courts have often struggled to enunciate a concise rule on what constitutes an expansion of a nonconforming use, a standard definition is that "the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance and that the use must be within the same spatial confines that the prior use occupied." *Township of White Lake* v *Lustig*, 10 Mich App 665 (1968). Because public policy militates against the expansion of nonconforming uses, zoning ordinances may properly limit that expansion. *Garb-Ko* v *Carrollton Twp*, 86 Mich App 350 (1978).

The Court believes that the change in the fare at plaintiff's theater was an expansion of plaintiff's nonconforming use. Plaintiff's theater might still be showing motion pictures, but the addition of X-rated movies to a drive-in theater necessarily works a fundamental change in the nature of plaintiff's business and the role of that business in the community. Yet this expansion of plaintiff's nonconforming use only justifies ordinances directed at remedying the expansion, or its results. *Garb-Ko* v *Carrollton Twp, Id.* Since Section 3 is the one section of Ordinance No. 77 which addresses the effects of showing X-rated films, only that section is justified as a remedy for the expanded use. Thus, Section 3 of Ordinance No. 77 is a proper regulation on state law grounds.

Even if a nonconforming use has not expanded, it is always subject to valid regulatory ordinances. *Renne* v *Waterford Township*, 73 Mich App 685 (1977). Nevertheless, there is a limitation on the regulatory ordinances which may be directed at a nonconforming use, for the regulatory ordinance may not be confiscatory in nature. The Michigan Court of Appeals has stated:

> The question of regulation of a nonconforming use is not an easy one to resolve because of the competing interests involved. On the other hand, the general health, safety, and welfare of the general populace would seem to demand that a nonconforming use be made to keep pace with existing technology, despite the fact that changes of that sort might result in financial outlay which might have the effect of diminishing the value of the use to some degree. On the other hand, because a nonconforming use represents a statutorily vested right . . . *regulation cannot be so onerous as to be confiscatory in nature.*
>
> *Orion Township* v *Weber*, 83 Mich App 712 (1978) (emphasis added)

The sections of Ordinance No. 77 all appear to be valid regulatory provisions. The difficult question is whether the provisions of that ordinance are confiscatory. Defendant argues that a confiscatory regulation is a regulation which so restricts property that it precludes its use for any purposes to which it is reasonably adapted. In support of this argument, plaintiff cites *Kropf* v *Sterling Heights*, 391 Mich 139 (1974). *Kropf*, however, is inapposite, for *Kropf* discusses when *zoning* ordinances are confiscatory. The instant case presents a different, and more specific question: When is a *regulatory ordinance* confiscatory, as applied to a nonconforming use? The Michigan courts have not articulated a

precise test on this issue, but instead have examined particular situations to determine if "regulation would be so *unreasonable* as to be confiscatory in nature?" *Orion Township* v *Weber*, 83 Mich App 712, 722 (1978) (emphasis added). Given this standard as to what is confiscatory, the Court affirms the Magistrate's findings that Ordinance Sections 2, 6, 7, 9, [*10*], 11, 12 and 13 are confiscatory.

Because state law grounds dispose of Ordinance Sections 2, 6, 7, 9, 10, 11, 12, and 13, the Court need analyze only Sections 3 and 8 under constitutional standards. Section 3 is designed to protect residents located near plaintiff's drive-in from being involuntarily subjected to movies of a sexually explicit nature. An American's right to the privacy of his own home is a right which has been rhapsodically praised both in literature and the law. As Chief Justice Burger wrote:

> The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.
>
> *Rowan* v *United States Post Office*, 397 US 728, 737 (1970).

By protecting a homeowner's right not to have the nearby drive-in beaming sexually explicit movies into his home, the township is certainly furthering a substantial governmental interest. Moreover, Section 3 does not prohibit the showing of any films, but only mandates that certain movies not be viewable from residences, leaving plaintiff the option of accomplishing this directive in whatever manner it deems feasible. The Court therefore believes that the incidental restriction on plaintiff's First Amendment freedoms is no greater than is

essential to the furtherance of defendant's substantial interest in protecting residential privacy. Accordingly, Section 3 is a constitutionally sound regulation. *Schad* v *Mt. Ephraim*, 452 US 61 (1981). As detailed in the Magistrate's recommendation, at this stage of the litigation, the Court will not require the defendant to product factual findings to support Section 3.

Section 8 provides that the drive-in theater cannot show films if those films are viewable from the public highway. The factual basis for this regulation lies in the testimony of Clay Township Police Corporal Gary Brusate, who testified that the theater caused traffic problems on Marsh Road. Because this regulation does not single out any particular type of film, it is a constitutionally sound regulation furthering in a precise manner a substantial government interest in the public welfare. *Erzno Znik* v *City of Jacksonville*, 422 US 205 (1975). As to plaintiff's vagueness challenge, the Court adopts the Magistrate's conclusion that the regulation is not vague.

CONCLUSION

For the reasons stated above, the Court ADOPTS IN FULL the Magistrate's recommendation. As to Sections 2, 6, 7, 9, 10, 11, 12, and 13, the Court finds that plaintiff has satisfactorily shown the existence of all the factors which are necessary to the issuance of a preliminary injunction under FR Civ P 65. *Mason County Medical Assoc* v *Knebel*, 563 F2d 256, 261 (6th Cir 1977). The Court is particularly persuaded by the fact that a preliminary injunction concerning the above mentioned sections merely preserves the status quo until a final resolution of this matter, while compliance with those sections would result in a large monetary outlay by plaintiff. With regard to Sections 3, 4, 5, and 8, the Court will not issue a preliminary injunction, and the

township may enforce those provisions. Accordingly, IT IS HEREBY ORDERED that the defendant, Township of Clay, its agents and employees, be enjoined and restrained from enforcing Sections 2, 6, 7, 9, 10, 11, 12, and 13 of regulatory Ordinance No. 77, pending a full and complete adjudication on the merits.

IT IS SO ORDERED.

/s/ JAMES HARVEY
United States District Judge

Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-221

In The

Supreme Court of the United States

October Term, 1986

TOWNSHIP OF CLAY,
a Michigan Township,

Petitioner,

vs.

SEAWAY DRIVE-IN, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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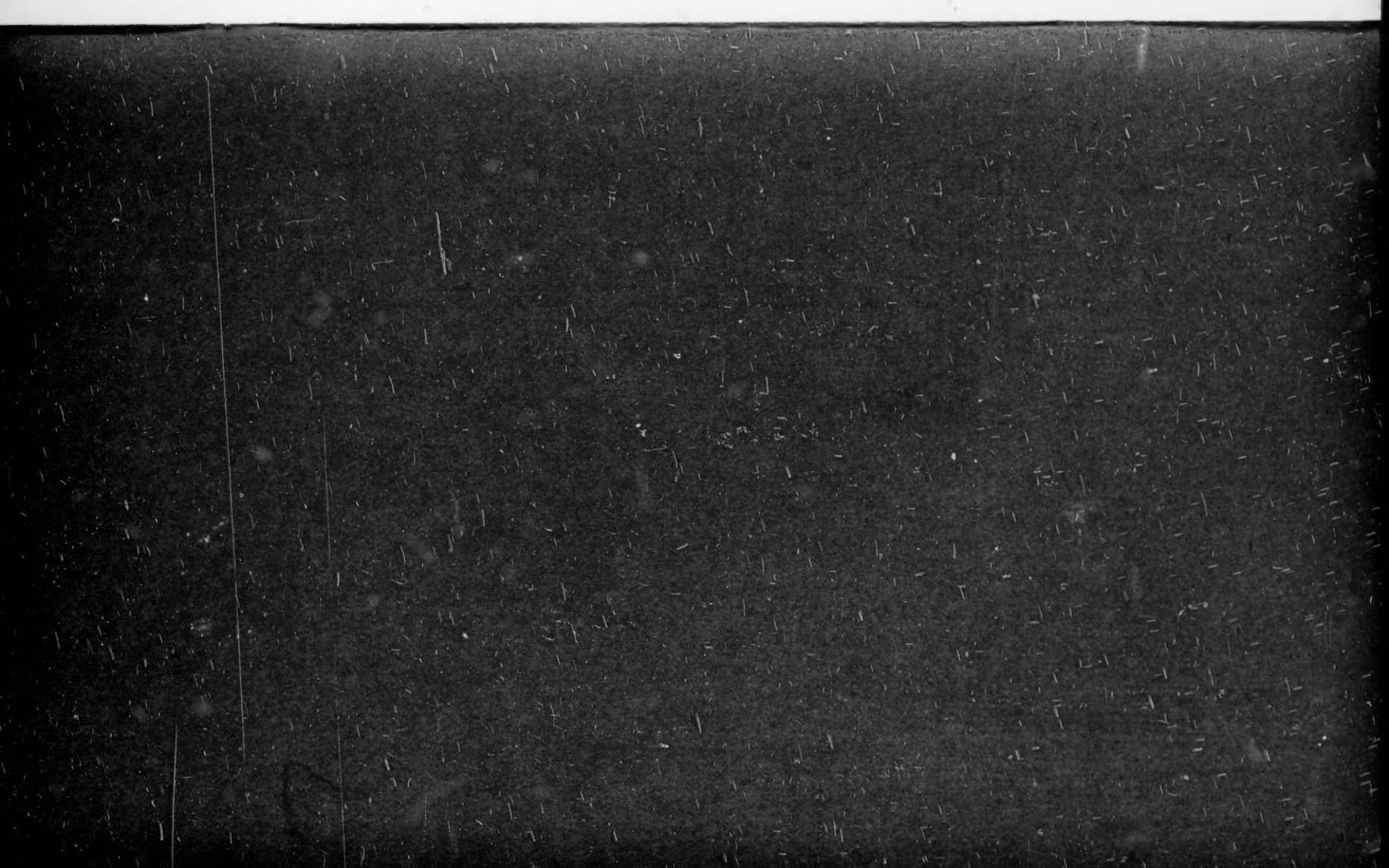

COUNTER-STATEMENT OF QUESTION INVOLVED

WHETHER A PLAINTIFF, HAVING PRESENTED FOR RESOLUTION FEDERAL CONSTITUTIONAL CLAIMS UNDER 42 USCA § 1983 AND PENDANT STATE LAW CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS, IS A "PREVAILING PARTY" FOR PURPOSES OF 42 USCA § 1988, WHERE THE PLAINTIFF PREVAILED ON THE PENDANT STATE LAW CLAIM, LEAVING THE § 1983 CLAIMS UNADDRESSED AND UNRESOLVED?

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REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals has now been published and can be found at 791 F2d 447 (CA6, 1986). The Opinion of the District Court has not been published.

COUNTER-STATEMENT OF THE CASE

Respondent Seaway Drive-In, Inc.*, is the operator of a drive-in motion picture theatre, the Seaway Drive-In, located at 8543 Marsh Road in Clay Township, Michigan. Respondent took over an existing drive-in theatre in 1982 and sought to change the films exhibited thereon

* Respondent is a Michigan corporation having no parent company, or subsidiaries and is not an affiliate of any other corporation.

from general release family fare to sexually explicit films meant for adults only.

In August of 1982, the respondent commenced exhibiting "adult type" motion picture films at its drive-in theatre. In response to this change in policy, the Township of Clay enacted a so-called "regulatory ordinance", Ordinance No. 77, on November 24, 1982. Soon after, on December 27, 1982, the attorney for Clay Township notified the respondent in writing that the theatre would have to comply with the new ordinance.

On March 3, 1983, respondent initiated an action in the United States District Court for the Eastern District of Michigan, Southern Division, civil action No. 83-CV-9025PH, pursuant to 42 USCA § 1983. Respondent alleged therein that Sections 2, 3, 6, 7, 8, 9, 10, 11, 12 and 13 of Clay Township Ord. No. 77, as written and/or as applied, violated its rights under the *First and Fourteenth Amendments* to the *Constitution of the United States*. In addition, respondent asserted a pendant state law claim, to-wit: that Ord. No. 77 violated MCLA § 125.271 et. seq. and MCLA § 125.286 et. seq., the State of Michigan Township Zoning Enabling Act. More particularly, respondent asserted that the Seaway Drive-In Theatre was a prior non-conforming use under the Clay Township Rural Zoning Ordinance and, as such, under Michigan zoning law, MCLA § 125.286 et. seq., the theatre had a lawful and vested right to continue in operation, and that Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ord. No. 77, were taken almost verbatim from the Township Rural Zoning Ordinance, and were enacted by the Township and termed a "regulatory ordinance" in a transparent effort to avoid the strictures of Michigan zoning law applicable to prior non-conforming uses with the specific purpose of forcing respondent out of business.

Respondent's Motion for Preliminary Injunction was referred to Magistrate Paul J. Komives for hearing, which was held on March 24, and 25, 1983. At the conclusion of the hearing the Magistrate took the matter under advisement, and on April 12, 1983, the Magistrate issued his report and recommendation. On January 12, 1984, the District Court adopted the Magistrate's report and recommendation in full, striking down Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ord. No. 77 on the pendant state law claim raised by plaintiff, stating that said provisions were, "confiscatory" (Petitioner's Appendix C, p. C-9), in light of the Michigan Zoning Enabling Act, thereby leaving unaddressed the federal constitutional claims raised by plaintiff pertaining to those sections of the ordinance, and upholding Sections 3 and 8 as constitutionally valid under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*. A preliminary injunction, in conformance with said *Memorandum Opinion and Order* was issued. On August 31, 1984, by consent of the parties, the aforesaid *Memorandum Opinion and Order* was made the final judgment of the court and a permanent injunction was entered enjoining the Township from enforcing Sections 2, 6, 7, 9, 10, 11, 12 and 13 against respondent.

On August 29, 1984, respondent filed a motion for attorney fees as the "prevailing party" in said action, pursuant to 42 USCA § 1988, in the amount of $20,085.80 in fees and costs. On March 25, 1985, the court denied respondent's request for attorney fees. On April 24, 1985, respondent filed a Notice of Appeal from the District Court's denial of attorney fees.

On May 19, 1986, the Sixth Circuit Court of Appeals reversed the District Court, ruling that, consistent with *Maher* v *Gagne*, 448 US 122 (1980), respondent had met the "substantiality" test and further, the § 1983 claims

and the pendant state law claims arose out of a "common nucleus of operative fact . . .", thus entitling respondent to an award of attorney fees pursuant to 42 USCA § 1988, as a "prevailing party".

REASONS FOR DENYING THE WRIT

This Honorable Court should deny the Writ of Certiorari heretofore filed in the instant matter for the reason that no substantial federal question has been presented for review. The decision of the Sixth Circuit Court of Appeals appended to the Petition for Writ of Certiorari and denominated as Appendix A, is entirely consistent with the decisions of this Court and the various Circuit Courts of Appeal which have considered the issue presented, to-wit: whether a plaintiff, having presented for resolution federal constitutional claims under 42 USCA § 1983 and pendant state law claims arising out of the same operative facts, is a "prevailing party" for purposes of 42 USCA § 1988, where the plaintiff prevailed on the pendant state law claim, leaving the § 1983 claims unaddressed and unresolved.

Simply stated, the respondent prevailed in the lower court on its pendant state law claim as to eight (8) sections of the ordinance under attack, leaving — as to those eight (8) provisions — the federal constitutional claims unaddressed.

This Court has ruled on the precise issue, stating in *Maher* v *Gagne*, 448 US 122, 132 fn #15 (1980):

> "The legislative history makes it clear that Congress intended fees to be awarded where a pendant constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the

Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, bill substantially identical to the Senate bill that was finally enacted, stated:

> 'To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claims for the purpose of awarding counsel fees. Morales v Haines, 486 F2d 880 (7th Cir 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v Lavine, 415 US 528, [39 LEd2d 577, 94 S Ct 1372] (1974). In some cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v Lavine, supra; United Mine Workers v Gibbs, 383 US 715, [16 LEd2d 218, 86 S Ct 1130] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v Gibbs, supra, at 725, [16 LEd2d 218, 86 S Ct 1130].'
>
> HR Rep No. 94-1558, p 4, n 7 (1976)."

Turning to the two criteria, as set out in *Maher, supra*, it is beyond dispute, as the Sixth Circuit Court of Appeals put it, that the ". . . fee and non-fee claims involved a common core of facts . . .", to-wit: the enact-

actment, and subsequent enforcement of Ordinance No. 77 against respondent's drive-in theatre.

Similarly, respondent's claims met the "substantiality test". In *Hagans* v *Lavine*, 415 US 528 (1974), this Court held that, given a substantial constitutional claim which provided a basis for pendant jurisdiction to adjudicate the statutory claim, the state law question should be decided first so as to avoid unnecessary constitutional adjudication. The issue as to whether a given plaintiff has presented a "substantial" constitutional issue is a threshold question. As this Court has stated, the cause of action must be "so insubstantial, implausible, foreclosed by prior decisions of this court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." The District Court impliedly found the constitutional issue to be "substantial", for it exercised its jurisdiction. To again quote from *Hagans, supra*, "Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the statutory claim." Thus, in order to reach the statutory claim, the District Court had to initially make that threshold determination. This is precisely what the Court of Appeals ruled when it stated, "If the District Court had pendant jurisdiction over the state law claims, as it presumbaly found that it did, then the constitutional (fee) claims were 'substantial' and the fee and non-fee claims must have arisen out of a 'common nucleus of operative fact.'" (Petitioner's Appendix A, p. A-8) As required by *Hagans, supra*, the District Court turned to the statutory claim first. Having taken that course and, having arrived at a determination that under the pendant state law claim, respondent was entitled to judgment as to Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ordinance No. 77, there was no reason for it to reach

the constitutional issues pertaining to those sections — and the court so held. Thus, as to those provisions of Ordinance No. 77 which the District Court ruled invalid on state law grounds, the constitutional issues raised by respondent were left unaddressed.

To reiterate, then, in *Maher* v *Gagne*, *supra* at 133, fn #15, the Supreme Court described the circumstances in which the plaintiff may qualify for a fee award when he succeeds on a non-fee federal statutory claim joined with a fee-generating federal constitutional claim that is not decided. If both claims arise out of a "common nucleus of operative fact", the Court noted, the plaintiff may be considered the prevailing party if the constitutional claim is sufficiently substantial to support the invocation of federal jurisdiction. This approach acknowledges the reluctance of federal courts to decide constitutional questions if a nonconstitutional claim is dispositive.

In *Smith* v *Robinson*, __ US __, 104 S Ct 3457, 82 L Ed2d 746 (1984), the Supreme Court reaffirmed its position. The Court quoted from the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC § 1988, *Id.* at __, 104 S Ct at 3456, 3467, "Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive." "Congress," the Court said, "did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground."

Thus, the Supreme Court affirmed the principle that a prevailing party who asserts substantial but unaddressed federal constitutional claims is entitled to attorney's fees under § 1988. *Id.* at __, 104 S Ct 3467, n. 10, 82 L Ed2d at 762, n. 10. Assuming *arguendo* that the claim for which fees are requested is reasonably related to the

plaintiff's ultimate success, the District Court may then ". . . assume that the plaintiff has prevailed on his fee-generating claim and . . . award fees appropriate to that success." *Id.* at __, 104 S Ct at 3467, 82 L Ed2d at 762.

Turning to the instant cause, the Sixth Circuit Court of Appeals noted, "The complaint attacked the ordinance as a whole on several constitutional grounds. First, it alleged that the purpose of the ordinance was to put appellant out of business and prevent it from showing sexually explicit material. Second, it alleged that the ordinance contained content-based speech restrictions. Third, it claimed that the ordinance gave the township arbitrary and uncontrolled discretion; fourth, that it was overly vague and broad; fifth, that it violates the equal protection clause and sixth, that it is an unconstitutional taking." (Petitioner's Appendix A, p. A-8) The Court of Appeals noted that, as to the eight (8) provisions of the ordinance the District Court held invalid under a pendant state law claim, the federal constitutional claims applicable thereto did not need to be addressed and were therefore left unresolved. (Petitioner's Appendix A, p. A-10, n. 10) Applying the reasoning of *Gagne* v *Maher, supra* and *Smith* v *Robinson, supra,* the respondent was accordingly entitled to "prevailing party" status entitling it to an award of attorney fees.

Those courts which have considered the issue presented herein have uniformly followed the same rationale and reached the same conclusion as the Court of Appeals reached in the instant matter. *McDonald* v *Doe,* 748 F2d 1055, 1057 (CA5, 1984); *State of New York* v *11 Cornwell Co.,* 718 F2d 22, 25 n. 3 (CA2, 1983) (*en banc*); *Williams* v *Thomas,* 692 F2d 1032, 1036 (CA5, 1983), *cert. denied sub. nom, Dallas County, Texas* v *Williams,* __ US __, 103 S Ct 3115, 77 L Ed2d 1369 (1983); *Gibbs* v *Town of Frisco City, Alabama,* 626 F2d 1218 (CA5, 1980); *Lund* v

Affleck, 587 F2d 75, 76-77 (CA1, 1978); *Kimbrough* v *Arkansas Activities Ass'n*, 574 F2d 423, 426-27 (CA8, 1978); *Seals* v *Quarterly County Court*, 562 F2d 390, 393-94 (CA6, 1977); *Bond* v *Stanton*, 555 F2d 172, 174 (CA7, 1977), *cert. denied*, 438 US 916, 98 S Ct 3146, 57 L Ed2d 1161 (1978); *Allen* v *Housing Authority*, 563 F Supp 108, 110 (E.D. Pa. 1983).

The cases cited by petitioner are simply inapposite to the matter at bar, for in each case, even though the plaintiff had prevailed on its pendant state law claim, *the federal constitutional claims were decided adversely to the plaintiff upon final hearing on the merits*. *McDonald* v *Doe*, *supra* at 1056, 1057. ("After trial, the jury responded to interrogatories that the defendant had not violated McDonald's constitutional rights, but that one defendant had been negligent in violation of state law . . ."); *Raley* v *Fraser*, 747 F2d 287, 290-91 (CA5, 1984) ("the trier of fact specifically found that Raley's constitutional rights were *not* infringed . . ." [emphasis in original]); *Haywood* v *Ball*, 634 F2d 740 (CA4, 1980) ". . . we find nothing in the statute, the legislative history or decisions on the subject which would require or justify an award of attorney's fees in a case where the plaintiff has lost on the constitutional issue after a plenary trial.")

At bottom then, petitioner argues that the federal constitutional claims pertinent to the eight provisions struck down on pendant state law grounds were either addressed and finally resolved when the District Court issued its Memorandum Opinion and Order of January 18, 1984, granting plaintiff's request for preliminary injunction (Petitioner's Appendix C), or, alternatively, the District Court had the authority to address the federal constitutional issue left unresolved upon the filing of a motion requesting attorney fees under 42 USCA § 1988. The first contention is contradicted by the Dis-

trict Court's Memorandum Opinion and Order of January 18, 1984, at p. C-9. ("Because state law grounds dispose of ordinance sections 2, 6, 7, 9, 10, 11, 12 and 13, the Court need analyze only sections 3 and 8 under constitutional standards.") The second contention is in patent contradiction to the Supreme Court's holding in *Maher* v *Gagne, supra* at 132-33, that, ". . . allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendant to a substantial constitutional claim . . . 'furthers the congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decisions of important constitutional issues' . . ." Yet the latter contention is precisely the course taken by the District Court which the Sixth Circuit Court of Appeals found in error.

Given a substantial constitutional issue sufficient to invoke federal court jurisdiction, where the District Court disposes of the matter on pendant state law grounds, leaving the federal constitutional issue unresolved, *Maher* v *Gagne, supra*, fn. #15, *Smith* v *Robinson, supra* requires the ". . . district court to *assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.*" *Id.* p. 762. The lower court simply failed to follow the holding of *Smith* v *Robinson, supra*. Rather than — as *Smith* v *Robinson* requires — make such an assumption and award fees in light of the level of respondent's success in accordance with the dictates of *Hensley* v *Eckerhart*, 461 US 424 (1983), the lower court proceeded to review the record and make findings of fact and conclusions of law as to the purported "insubstantiality" of respondent's claim that Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ordinance No. 77 were invalid on federal constitutional grounds, even though that issue was left undecided by the Court's own decision ruling in

respondent's favor on pendant state law grounds. To then assert — as petitioner does — that the trial court has the authority to determine the merits of respondent's unaddressed fee-generating claim by reviewing the record of a two-day hearing on a motion for preliminary injunction and determine that respondent had failed to meet its burden that Sections 2, 6, 7, 9, 10, 11, 12 and 13 violated its federal constitutional rights, as a basis for denying its request for attorney fees, finds no judicial support anywhere. There is, therefore, no justification for reviewing the decision of the Sixth Circuit Court of Appeals in the instant matter.

CONCLUSION

To summarize, the Court of Appeals for the Sixth Circuit was quite correct in ruling that the District Court had applied an incorrect standard in determining whether respondent was a "prevailing party" for purposes of an award of attorney fees pursuant to 42 USCA § 1988.

For those reasons as hereinabove stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: September 8, 1986.